

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In Re: Pork Antitrust  
Litigation

File No. 18-CV-1776  
(JRT/HB)

Minneapolis, Minnesota

March 16, 2022

10:07 a.m.

**BEFORE THE HONORABLE MAGISTRATE JUDGE HILDY BOWBEER**

**UNITED STATES DISTRICT COURT JUDGE**

**(STATUS CONFERENCE VIA ZOOM VIDEO CONFERENCE)**

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Proceedings reported by court reporter; transcript produced  
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**P R O C E E D I N G S**

**IN OPEN COURT VIA ZOOM**

**(10:07 a.m.)**

THE COURT: Good morning, everyone. I've still got some folks coming in from the waiting room, so give me a second to bring everyone in from the cold. All right. That looks like it has stabilized.

Well, good morning, everyone. I'm Magistrate Judge Hildy Bowbeer -- and somebody else has entered the waiting room -- and we are gathered for a conference in the matter of In Re Pork Antitrust Litigation, which is proceeding under Docket Number 18-CV-1776.

What I have done in the past and what I will do on this occasion as well is to call out the names of the people that reported to my chambers that they would be attending. I think I spotted a couple of additional names in the waiting room. I've tried to flag those as well. So what I will ask is when I call your name, let me know you're -- you know, confirm you're here for the record. And then as usual, I will also do a last call at the end of each type of plaintiff or group of defendants and see if there's anyone else who wants their appearance noted.

So let's start with counsel for the class plaintiffs, and among them, let's start with counsel for the direct purchaser plaintiffs. It looks like we're joined

1 this morning by Bobby Pouya.

2 MR. POUYA: Good morning, Your Honor.

3 THE COURT: Brian Clark.

4 MR. CLARK: Good morning, Your Honor.

5 THE COURT: Joseph Bourne.

6 MR. BOURNE: Good morning, Your Honor.

7 THE COURT: Michael Pearson.

8 MR. PEARSON: Good morning, Your Honor.

9 THE COURT: Steven Hart. I thought I saw  
10 Mr. Hart. Maybe not. All right. So at the moment I don't  
11 have Mr. Hart present.

12 Joseph Bruckner.

13 MR. BRUCKNER: Yes, Your Honor. Good morning.

14 THE COURT: Does anybody know whether Mr. Hart  
15 will be joining us this morning?

16 MR. BRUCKNER: I don't know, Your Honor, but I  
17 think we can proceed.

18 THE COURT: Okay. And is there anyone whose name  
19 hasn't been called who would like their appearance noted on  
20 behalf of the direct purchaser class plaintiffs?

21 MR. PEARSON: Good morning, Your Honor. Clifford  
22 Pearson.

23 THE COURT: I've got Clifford Pearson as well  
24 then. Thank you.

25 Anyone else?

1 Moving on to the consumer indirect purchaser class  
2 plaintiffs, I have Breanna Van Engelen.

3 MS. VAN ENGELEN: Good morning, Your Honor.

4 THE COURT: Daniel Hedlund.

5 MR. HEDLUND: Good morning, Your Honor.

6 THE COURT: Michelle Looby.

7 MS. LOOBY: Yes. Good morning, Your Honor.

8 THE COURT: Shana Scarlett.

9 MS. SCARLETT: Good morning, Your Honor.

10 THE COURT: Is there anyone else who wanted their  
11 appearance noted on behalf of the consumer indirect  
12 purchaser class plaintiffs?

13 Moving on to the commercial and institutional  
14 indirect purchaser class plaintiffs, I've got Blaine Finley.

15 MR. FINLEY: Good morning, Your Honor.

16 THE COURT: And Shawn Raiter.

17 MR. RAITER: Good morning, Your Honor.

18 THE COURT: Is there anyone else who wanted their  
19 appearance noted on behalf of the commercial and  
20 institutional indirect purchaser class plaintiffs?

21 That takes me, I believe, to the direct action  
22 plaintiffs. And so for the Commonwealth of Puerto Rico, I  
23 have Kyle Bates.

24 MR. BATES: Good morning, Your Honor.

25 THE COURT: Anybody else want their appearance

1 noted for the Commonwealth of Puerto Rico?

2 Moving on to the direct action plaintiffs who are  
3 commonly represented with Dollar General, Jeffrey Bergman.

4 MR. BERGMAN: Yes, Your Honor. Good morning.

5 THE COURT: Is there anyone else who wanted their  
6 appearance noted on behalf of that group of direct action  
7 plaintiffs?

8 Moving on to the direct action plaintiffs who are  
9 commonly represented with Cheney Brothers, Kristin Gore.

10 MS. GORE: Good morning, Your Honor.

11 THE COURT: Is there anyone else appearing on  
12 behalf of that group of direct action plaintiffs who wanted  
13 their appearance noted?

14 Moving to the direct action plaintiffs that are  
15 together with Kroger, Michael Ponzoli.

16 MR. PONZOLI: Good morning, Your Honor.

17 THE COURT: Samuel Randall.

18 MR. RANDALL: Good morning, Your Honor.

19 THE COURT: William Blechman.

20 MR. BLECHMAN: Your Honor, good morning. Thank  
21 you.

22 THE COURT: Anyone else who wants their appearance  
23 noted on behalf of the Kroger Direct Action Plaintiffs?

24 Now, the meat direct action plaintiffs, Michael  
25 McCahill.

1 MR. McCAHILL: It's Matthew McCahill. I'm here,  
2 Your Honor.

3 THE COURT: I'm sorry. It's right here correct  
4 and I --

5 MR. McCAHILL: I look like a Michael.

6 THE COURT: Matthew McCahill, you're here. And  
7 Robert Kaplan.

8 MR. KAPLAN: Yes, Your Honor. Good morning.

9 THE COURT: Is there anyone else who wants their  
10 appearance noted on behalf of the group of plaintiffs that  
11 is commonly represented with Action Meat?

12 The Sysco Direct Action Plaintiffs, Michael  
13 Mitchell.

14 MR. MITCHELL: Present, Your Honor.

15 THE COURT: Sarah Jones.

16 MS. JONES: Also present, Your Honor.

17 THE COURT: And Scott Gant.

18 MR. GANT: Good morning, Your Honor.

19 THE COURT: Mr. Gant, I don't know if you'll be  
20 speaking. At least when you spoke just now, your voice was  
21 pretty distorted. So if it turns out you're going to be  
22 speaking, we'll address that at the time, but I just wanted  
23 to give you a heads-up.

24 Anyone else who wants their appearance noted on  
25 behalf of the Sysco Direct Action Plaintiffs?

1 All right. On behalf of the Kraft Heinz and  
2 Winn-Dixie Direct Action Plaintiffs, Jack Stern.

3 MR. STERN: Yes, Your Honor. Present.

4 THE COURT: That's the only one I caught, I think,  
5 in the waiting room on behalf of that group of direct action  
6 plaintiffs, but is there anyone else who wanted their  
7 appearance noted?

8 Moving to the Nestle Direct Action Plaintiffs, or  
9 the plaintiffs that are commonly represented with Nestle,  
10 David Eddy.

11 MR. EDDY: Here, Your Honor. Thank you.

12 THE COURT: Anyone else who wants their appearance  
13 noted for that group of plaintiffs?

14 Let's move on to the defendants. Agri Stats. I  
15 see Liam Phibbs.

16 MR. PHIBBS: Good morning, Your Honor.

17 THE COURT: And William Leitzsey Monts.

18 MR. MONTS: Good morning, Your Honor.

19 THE COURT: Anyone else from Agri Stats?

20 MR. MONTS: No. That's all for us, Your Honor.  
21 Thank you.

22 THE COURT: The Clemens defendants, Max Samels.

23 MR. SAMELS: Good morning, Your Honor.

24 THE COURT: Anyone else on behalf -- I think I saw  
25 Peter Schwingler. Is Mr. Schwingler present as well?

1 MR. SCHWINGLER: I am. I'm on behalf of the  
2 Seaboard defendants.

3 THE COURT: All right. We're still working the  
4 bugs out. For some reason you showed up for both.

5 Is there anyone else that wants their appearance  
6 noted for the Clemens defendants other than Mr. Samels?

7 All right. For Hormel, Craig Coleman.

8 MR. COLEMAN: Good morning, Your Honor.

9 THE COURT: Anyone else on behalf of Hormel?

10 MR. COLEMAN: No, Your Honor.

11 THE COURT: JBS USA, Donald Heeman.

12 MR. HEEMAN: Good morning, Your Honor.

13 THE COURT: Richard Vagas.

14 MR. VAGAS: Good morning, Your Honor.

15 THE COURT: Anyone else on behalf of JBS?

16 MR. VAGAS: No, Your Honor.

17 THE COURT: Seaboard Foods. Now we've got  
18 Mr. Schwingler, and I know you're here.

19 Is there anyone else who wants their appearance  
20 noted for Seaboard Foods?

21 MR. SCHWINGLER: Just me today, Your Honor.

22 THE COURT: Smithfield Foods, Brian Robison.

23 MR. ROBISON: Good morning, Your Honor.

24 THE COURT: John Kvinge.

25 MR. KVINKE: Good morning, Your Honor.

1 THE COURT: Rod Stone.

2 MR. STONE: Good morning, Your Honor.

3 THE COURT: Anyone else on behalf of Smithfield  
4 Foods?

5 Triumph Foods. I've got James Spung.

6 MR. SPUNG: Good morning, Your Honor.

7 THE COURT: And Christopher Smith.

8 MR. SMITH: Good morning, Your Honor.

9 THE COURT: Anyone else on behalf of Triumph?  
10 Moving on to Tyson, I've got Jarod Taylor.

11 MR. TAYLOR: Here, Your Honor.

12 THE COURT: Is there anyone else here on behalf of  
13 Tyson?

14 MR. TAYLOR: Tiffany --

15 MS. RIDER ROHRBAUGH: This is Tiffany Rider  
16 Rohrbaugh.

17 THE COURT: Okay. There you are. I didn't spot a  
18 name, and I didn't recognize your phone number.

19 Anyone other than Mr. Taylor and Ms. Rider  
20 Rohrbaugh?

21 MR. TAYLOR: No, Your Honor.

22 THE COURT: And I think that covers the group. I  
23 know that I admitted one or two people after I got started,  
24 so let me simply ask: Is there anyone else whose name  
25 hasn't been called who wants their appearance noted? Going

1 once, going twice. All right. So I think we've got our  
2 full complement.

3 So at the case management conference at the end of  
4 January -- this is just by way of reprise -- the parties  
5 discussed with me a number of case management issues, but  
6 among those was whether individual direct action plaintiff  
7 complaints or a single consolidated direct action plaintiff  
8 complaint or some hybrid approach would best serve to  
9 streamline the MDL.

10 One of the things I asked you to do was explore  
11 what a hybrid model might look like, and you all did that  
12 and you responded with your thoughts and your input by a  
13 letter that was filed, I believe, at Docket Number 1181-1.

14 After that conference, Chief Judge Tunheim  
15 convened a status conference himself with you all, and there  
16 was some further discussion at that time about whether there  
17 ought to be a consolidated complaint, and he took additional  
18 input at that time.

19 And I believe at that time he also raised with you  
20 the need for some, you know, co-organization, for want of a  
21 better word, of the class and direct action plaintiffs,  
22 together through the appointment of liaison counsel and a  
23 steering committee.

24 So Chief Judge Tunheim and I have talked about  
25 those issues since those conferences were held, and we're

1 close to making some final decisions on the scheduling order  
2 in this case, but obviously the issue of that, how to  
3 address the direct action complaints is a key concern, as  
4 also is the need for some organization and some formal  
5 coordination between the class plaintiff side of things and  
6 the direct action side of things so that to the extent  
7 possible, the direct action plaintiffs can ultimately catch  
8 up with the class plaintiffs and the case can move in a  
9 coordinated and efficient fashion.

10 So Judge Tunheim and I have talked about those  
11 issues, and he asked me to preview with you certain ideas  
12 and to report back to him about your thoughts on those  
13 ideas. So what I'm going to do is put these out on the  
14 table and then I'll seek out comment, both live and in  
15 person, or at least live and by Zoom, from you all today,  
16 but will also give you an opportunity to conjugate a bit  
17 more and provide any further thoughts by letter, and I'll  
18 get to that in a moment.

19 But let me talk about -- put out both pieces that  
20 I want to get input from you on first, and then I'll call on  
21 the groups in order to share your thoughts, reactions,  
22 questions, mostly for me. Once I tell you what our ideas  
23 are, this is mostly going to be listening for me.  
24 Ultimately I'll take this back to the Chief and a final  
25 decision will be made.

1           What I will ask, since usually when we're talking  
2 motions or case management conference, you've told me ahead  
3 of time who's going to be speaking. You've done that to  
4 some extent here as well, and I appreciate that, but I also  
5 recognize that since you didn't know for sure what we were  
6 going to discuss, there are some of you who may want to  
7 address these things who didn't sign up to be a speaker, and  
8 I want to give you that opportunity.

9           So what I'm going to ask, as I call on each group  
10 of plaintiffs and defendants, I'm going to ask you to  
11 raise -- to use the hand-raise option on your Zoom device so  
12 that I can actually see you and call on you, and that will  
13 make it easier for our court reporter to avoid interruption  
14 and to know who they're hearing from at any given time.

15           So first, we've concluded that both party and  
16 judicial efficiency would best be served by requiring a  
17 master amended complaint from the existing direct action  
18 plaintiffs as well as for future direct action plaintiffs.  
19 For now it would only include the direct action plaintiffs,  
20 although we're not ruling out completely the possibility  
21 that in the future there could be some request for an  
22 amended master complaint that would fold in the class  
23 plaintiffs, but we're not going there now and that's not a  
24 part of the plan as we see it.

25           Our vision at this point is that the master

1 complaint should also include the direct action plaintiffs  
2 who preceded the MDL, mainly the Winn-Dixie plaintiffs and  
3 the Commonwealth of Puerto Rico, but certainly that's  
4 something on which we will listen to additional comments.

5 As we envision it, the master complaint should  
6 include sections of allegations for each category of direct  
7 action plaintiffs. And it occurs to us that in preparing  
8 the master complaint, counsel -- and each section of the  
9 master complaint, counsel may find useful guidance in the  
10 existing class action complaints, but obviously you're not  
11 bound by that.

12 The defendants would be required to answer that  
13 master complaint in full, but in addition, we would propose  
14 that the parties work together to prepare a standard  
15 short-form complaint or short-form fact sheet that would be  
16 specific to each direct action plaintiff and would be --  
17 that would have blanks, for lack of a better word, to be  
18 filled in by the specific direct action plaintiffs to  
19 identify party-specific facts.

20 The defendants would not need to replicate in  
21 response to each short-form complaint or fact sheet the  
22 entirety of their answers to the master complaint. That  
23 would sort of defeat the purpose. But they would be  
24 required to respond to the specifics of the short-form  
25 complaint or fact sheet, whatever we end up calling it,

1 including identifying as to each direct action plaintiff any  
2 affirmative defenses that they intend to rely on as against  
3 that plaintiff.

4 So that's piece number one of this, and we're  
5 interested in your questions, reactions, thoughts about that  
6 construct. And I'll call on you for those in just a moment,  
7 but let me get to piece number two.

8 As the Chief previewed in your previous conference  
9 with him, he is eager to proceed with appointing a  
10 plaintiffs' liaison counsel and a plaintiffs' steering  
11 committee that would include representation from both the  
12 class plaintiff side of things and the direct action  
13 plaintiffs' side of things.

14 For liaison counsel, we would propose and prefer  
15 that the plaintiffs identify one person from the class side  
16 and one person from the direct action side.

17 For the steering committee, we're interested in  
18 perhaps five to seven from each side. We're open to your  
19 thoughts on this, but just for the sake of putting some  
20 numbers on it, perhaps five individuals from the class side  
21 and five individuals from the direct action side. As I say,  
22 we're open to your input about that number and about how  
23 that group ought best to be constituted.

24 One thing that has to be a part of that, though,  
25 and you know this from previous conferences with me as well

1 as the Chief having long been on record in this regard, is  
2 that diversity in the leadership roles and on the steering  
3 committee is of critical importance to him in making those  
4 appointments.

5 So that's the overview. Those are the two pieces  
6 that he asked me to preview with you and that he is  
7 interested in your thoughts today, to the extent you're  
8 eager and willing to share them, but as I say, we'll also  
9 give you a time-limited opportunity to submit additional  
10 thoughts and reactions by letter.

11 So let's start with each of those two pieces.  
12 We'll take them one at a time, and I'll cycle through the  
13 constituencies, and then we'll circle back for part number  
14 two.

15 So first, with regard to the master complaint and  
16 how that ought to be structured and reactions about a  
17 short-form complaint or fact sheet and how the defendants  
18 would respond thereto. So that's proposal number one.

19 Let me start I think with -- to get some reactions  
20 from the direct action plaintiffs, start with them and then  
21 go to the class action plaintiffs and then go to the  
22 defendants. But as I indicated, it would be easier for me  
23 if you use the hand-raise signal so that I know who I should  
24 be calling on.

25 So is there anyone from the direct action

1 plaintiffs who wants to comment? And I'm seeing two people  
2 at the moment. Let's start with Mr. Gant. I think I saw  
3 his hand first.

4 MR. GANT: Good morning, Your Honor. Can you hear  
5 me okay now?

6 THE COURT: I can, yes.

7 MR. GANT: Okay. And I apologize. I'm not on  
8 video. I was expecting Mr. Mitchell to cover much of what  
9 we were going to discuss today, not knowing what the agenda  
10 was.

11 Moving on to the substance, first, we appreciate  
12 your and Chief Judge Tunheim's careful consideration of  
13 these issues, and we look forward to be able to present some  
14 thoughts in writing, as you suggested.

15 For the reasons that I and others have stated in  
16 prior conferences, the direct action plaintiffs oppose the  
17 idea of being forced to file a consolidated pleading for the  
18 reasons we've explained and we'll elaborate on again in  
19 writing.

20 There is one particular aspect of this, though,  
21 that we haven't really addressed that I think is important  
22 to cover, which is that we -- for example, Sysco filed its  
23 complaint, I believe, about one year ago. We do not have  
24 any pleading of defenses or affirmative defenses from any of  
25 the defendants, and we're in the midst of a very tight

1 discovery schedule where the Court has aspired to catch up  
2 the direct action plaintiffs to the classes, and we're  
3 working diligently to do that.

4 But without having defenses and affirmative  
5 defenses pled by the defendants, we are handicapped in our  
6 ability to conduct discovery in a way that protects  
7 ourselves. We're in the middle of taking depositions where  
8 we don't have defenses and affirmative defenses, and we may  
9 have to come back and ask the Court to reopen all of the  
10 depositions to the extent that they're relevant to the  
11 litigation of our defenses -- of defenses which haven't been  
12 asserted.

13 And this proposal additionally prejudices us  
14 because -- and the defendants, by the way, have not obtained  
15 any relief from the Court for having to file defenses and  
16 affirmative defenses. There were deadlines that have come  
17 and gone, and the defendants have not met them and they have  
18 not obtained orders from the Court that would relieve them  
19 of those deadlines.

20 The proposal that the Court is now advancing seems  
21 to me will further prejudice the direct action plaintiffs in  
22 this regard because if we're compelled to file a  
23 consolidated pleading, which would then be responded to,  
24 we're months away, from today, from receiving defenses and  
25 affirmative defenses in a case where we're supposed to

1 complete fact discovery this year. That is extremely  
2 prejudicial to us, and we're not sure that the Court has yet  
3 focused on that because that subject really hasn't come up  
4 yet. It's been an obvious fact in the discussions, but I  
5 don't think anyone has focused on the fact that we don't  
6 have these, which I think everyone would acknowledge we  
7 should be entitled to receive early enough in discovery so  
8 that we can take discovery to marshal responses to defenses  
9 and affirmative defenses. So this is an additional  
10 extremely important complicating factor that we believe the  
11 Court needs to take into account, and --

12 THE COURT: Mr. Gant?

13 MR. GANT: Yes.

14 THE COURT: Mr. Gant, sometimes your voice is  
15 trailing off. I think I can discern what -- and it was just  
16 in the last couple of sentences, but I just wanted to ask  
17 you to make sure you speak up so that we don't miss your  
18 comments.

19 MR. GANT: Thank you, Your Honor.

20 So hopefully you heard the thrust of the  
21 observation that I was making. We think this is extremely  
22 important and is one, but only one, of many reasons why  
23 being forced to go through the process of drafting a  
24 consolidated pleading will be further prejudicial because,  
25 as I noted previously, including with Chief Judge Tunheim,

1 it's extremely time-consuming to put together a consolidated  
2 pleading. So that just prolongs the date by which we will  
3 receive defenses and affirmative defenses, which we need to  
4 litigate this case.

5 Thank you, Your Honor.

6 THE COURT: Understood. And I did catch all of  
7 your comments. I just wanted to let you know where it was  
8 starting to trail off, but I heard you loud and clear. So  
9 thank you.

10 Anything further, Mr. Gant, subject to writing a  
11 letter?

12 MR. GANT: Not at this time. Thank you, Your  
13 Honor.

14 THE COURT: All right. Mr. Bates, I saw your hand  
15 next. And then I'll call on Mr. Kaplan.

16 MR. BATES: Thank you, Your Honor. And thank you  
17 and Chief Judge Tunheim for considering these issues and  
18 presenting that background to us.

19 I also wanted to re-raise some distinctions  
20 between the Commonwealth of Puerto Rico and the other direct  
21 action plaintiffs, which I also spoke with Judge Tunheim  
22 about when he convened the last status conference on this  
23 issue, and there are both procedural and substantive  
24 differences between Puerto Rico and the rest of the direct  
25 action plaintiffs. Puerto Rico is a governmental entity,

1 and it doesn't resell products. And I actually think that  
2 those substantive differences bear more on your second point  
3 with regard to liaison counsel and a steering committee.

4 The procedural differences that I want to  
5 highlight for the Court I think more relate to the idea that  
6 Puerto Rico would be included in a master complaint. As I  
7 just mentioned briefly, Puerto Rico's allegations are  
8 different. Puerto Rico's place in the market is different.  
9 But we also don't have the procedural concerns that Mr. Gant  
10 just referenced. The defendants have answered Puerto Rico's  
11 complaint. Puerto Rico is participating in depositions.  
12 Puerto Rico doesn't have the issues that Mr. Gant just  
13 raised. And so the -- at least for Puerto Rico, we don't  
14 see the benefit of including Puerto Rico in a complaint  
15 dominated by allegations and largely intended to serve  
16 direct action plaintiffs that are fundamentally different  
17 from Puerto Rico, while not conferring any of the benefits  
18 that may arise from doing that.

19 And so for that reason, Puerto Rico would ask not  
20 to be included in any master amended complaint.

21 THE COURT: Thank you, Mr. Bates.

22 Mr. Kaplan, I see your hand up.

23 MR. KAPLAN: Yes. Thank you, Your Honor.

24 I think the basic thesis of this is wrong when  
25 Your Honor said the direct action plaintiffs should catch

1 up. We are caught up. I mean, my clients have produced --  
2 substantially completed our document production. We are  
3 participating in the depositions. We have the same  
4 discovery cutoff schedule. So we are caught up.

5 And I would respectfully endorse what Mr. Gant  
6 said. I think this master complaint will just slow things  
7 down and will put us behind when we're already caught up.  
8 So I don't think it makes sense, but of course, if Your  
9 Honor and Judge Tunheim wants us to do that, we will, of  
10 course, you know, comply with whatever the Court wants. But  
11 I don't think, for the reasons that Mr. Gant said, that it  
12 makes any sense.

13 THE COURT: And to be clear, I understand and  
14 Judge Tunheim understands that by objecting, and even  
15 strenuously objecting, you're not saying that you won't do  
16 it if we order you to do it. We appreciate your input on  
17 this but also understand the good faith with which you will  
18 comply with anything we decide ought to be done.

19 One thing I would like to clarify in terms of any  
20 subsequent written remarks is that while the -- want to hear  
21 any additional or re-emphasize arguments you'd care to make  
22 about whether this should happen or why it shouldn't happen  
23 because I think we're headed in this direction. In addition  
24 to re-emphasizing any objections, we would like you to  
25 comment on the content of it as well. In other words, if

1 we've got to do this, then we have the following input about  
2 how it should be structured. So please plan for  
3 the alternative on the assumption that the objections won't  
4 win the day here.

5 Mr. Kaplan, was there anything else from you?

6 MR. KAPLAN: No, Your Honor. Not on point one,  
7 which is what you want comments on.

8 THE COURT: Right. I'll circle back to everybody  
9 on point two.

10 Mr. Randall.

11 MR. RANDALL: Yes, Your Honor. Thank you.

12 And I appreciate Your Honor's comments about  
13 working within the framework of planning for this to happen.  
14 I would just add to what Mr. Gant and what Mr. Kaplan said  
15 about the added delay that we're concerned that this would  
16 add.

17 You know, I don't think -- as we've discussed this  
18 process, one of the things that I don't think we've -- when  
19 it comes down to this, we owe a fiduciary duty to our  
20 clients to make allegations that they agree with. And so if  
21 Mr. Gant or Mr. Kaplan has included certain allegations, you  
22 know, we have to start this process of vetting every single  
23 allegation that's different if we're being forced to conform  
24 our allegations to the allegations of another plaintiff  
25 because, you know, we can't just allege something because

1 another plaintiff has alleged it. We have to clear every  
2 single one of these allegations that's different with our  
3 clients, and so it's a very time-consuming process.

4 And so, you know, to the extent the Court is going  
5 in this direction, you know, we would ask that the complaint  
6 essentially include -- you know, allow for large differences  
7 where we're alleging something that Mr. Gant's clients are  
8 not or Mr. Kaplan's are not. You know, for example, we have  
9 a number of allegations in our complaint. We've brought up  
10 Packers and Stockyards Act claims. So there are a number of  
11 allegations in our complaint that other direct action  
12 plaintiffs have not raised. You know, we have slightly  
13 different theories that we've made that other direct action  
14 plaintiffs have not raised.

15 And so it's going to be a very, very  
16 time-consuming process to try to conform our allegations to  
17 others. And I think there are a number of allegations that  
18 we would need to include that others do not, just because of  
19 the differences of the complaint that we are asserting.

20 THE COURT: All right. Thank you, Mr. Randall.

21 I saw Mr. Blechman next and then Mr. Eddy. So  
22 Mr. Blechman, you're on.

23 You are muted.

24 MR. BLECHMAN: Well, then you'll believe me now,  
25 Your Honor, when I tell you that I wasn't completely facile

1 with all the buttons here to raise my hand or not. So  
2 Mr. Randall actually covered it, and I inadvertently hit the  
3 button. But as long as I've got a little air time, I just  
4 have two points of clarification, if I might.

5 The first is with regard to the defendants' -- I'm  
6 going to use the word consolidated answer. I don't know if  
7 that's what Your Honor used. But whatever the defendants  
8 are putting in as the long form of the answer to the  
9 complaint, I'm wondering if you could share with us any more  
10 texture to what the Court is considering in terms of what  
11 that looks like because defendants have fiduciary duties to  
12 their clients, just like, as Mr. Randall said, we do to each  
13 of our respective clients.

14 And as part of that, Your Honor -- and I'll ask  
15 this other thing and then I'll be quiet -- does the Court  
16 have some idea of timing for this process in so -- picking  
17 up on the point Mr. Gant made earlier? Because if I'm  
18 understanding what Your Honor said correctly, what the Court  
19 has in mind is a consolidated pleading filed by all direct  
20 action plaintiffs, which is going to be a considerable  
21 undertaking and it will take time, and then the Court has in  
22 mind, I think, a consolidated answer and defenses filed by  
23 the defendants.

24 THE COURT: No. And if what I said sounded like  
25 that, I take responsibility. It isn't what I was thinking

1 or what Judge Tunheim was thinking.

2 Each defendant or defendant group would still need  
3 to file its own answer to the consolidated complaint. There  
4 would not be a consolidated answer to the consolidated  
5 complaint.

6 So the answer -- what I meant to say was that each  
7 defendant or defendant group would answer the master  
8 complaint in full and then would respond to each short-form  
9 complaint, plaintiff-specific complaint, with their  
10 affirmative defenses and any other counter-contentions to  
11 what was in that short form.

12 Does that help?

13 MR. BLECHMAN: It does, and I apologize if I  
14 misunderstood what Your Honor said. And it's not my  
15 practice to ask the Court a question, and the Court can tell  
16 me to just listen to what you're saying going forward. But  
17 if I might ask you a question to help us in understanding  
18 what the Court has in mind and in considering further those  
19 points when we submit something further in writing.

20 Can you help us understand, Your Honor, the  
21 Court's thinking as to why the defendants would each file  
22 separate answer defenses given that -- recognizing they have  
23 fiduciary duties, whereas the direct action plaintiffs all  
24 would have to file a consolidated pleading, notwithstanding  
25 the fiduciary duties that all of us have to our respective

1 clients? I'm just wondering about why the differential  
2 treatment.

3 THE COURT: It sounds a little like  
4 cross-examination.

5 MR. BLECHMAN: Your Honor, I can assure you I  
6 genuinely don't intend that, but --

7 THE COURT: I know.

8 MR. BLECHMAN: -- in the spirit of this  
9 conversation with the Court that you've mentioned at the  
10 top, I thought it might not be inappropriate to ask that  
11 question, but I certainly understand if you tell me that I  
12 should just listen to what Your Honor is saying.

13 THE COURT: I will do my best, although I can't  
14 speak for Judge Tunheim because that was not a question that  
15 Judge Tunheim and I talked about.

16 First, it is my understanding, and I'm eager to  
17 learn more if I'm incorrect on this, but it's my  
18 understanding that in the typical MDL, which we're dealing  
19 with here, that there is often a master complaint, but I'm  
20 not aware of any situation where in a multi-defendant MDL  
21 there are master answers. So that's one piece. I think it  
22 is generally the case that the responsibility where a master  
23 complaint has been called for has been a plaintiffs -- has  
24 been one-sided, if you will. The plaintiffs file that.

25 I think that the allegations that the plaintiffs

1 are making, there's a great deal of commonality. They, at  
2 least within categories of plaintiffs, understand that they  
3 are not identical and that there may be some important  
4 differences but that there is significant commonality in the  
5 claims and allegations.

6 On the other hand, the defendants have their own  
7 course of conduct and their own potential affirmative  
8 defenses that they would allege in response.

9 And so I'm not aware of any precedent -- even  
10 though I'm aware of precedent for a master complaint, I'm  
11 not aware of any precedent for master answers. As I say,  
12 I'm always willing to be educated on the subject, but that  
13 would be a new one to me.

14 Is that something you're familiar with,  
15 Mr. Blechman?

16 MR. BLECHMAN: No, Your Honor. And I don't mean  
17 to imply that that would necessarily be something to do  
18 here. I was really just looking to understand better what  
19 you and the Chief Judge are thinking about as you are  
20 contemplating how to manage the MDL and how to structure the  
21 case.

22 And I thought your remarks, at least for me, were  
23 very helpful. And I'm done with my questions, so thank you  
24 very much. But I had no agenda, Your Honor, other than to  
25 better understand what you all were thinking.

1 THE COURT: Okay. And I appreciate the question,  
2 and if the response was useful, then that's a good thing  
3 too.

4 MR. BLECHMAN: Yeah.

5 THE COURT: Anything else, Mr. Blechman?

6 MR. BLECHMAN: The defendant-specific defenses to  
7 a given plaintiff are quite crucial to any direct action  
8 plaintiff being able to respond in discovery and being able  
9 to do those things necessary in presenting the case further,  
10 as Mr. Gant alluded to, and I wouldn't want to do anything  
11 to undercut our ability to get those kind of plaintiffs'  
12 defendant-specific responses that are so important to being  
13 able to discover and prosecute the case.

14 THE COURT: Understood. And certainly in my  
15 conversations with Chief Judge Tunheim, the proposal, the  
16 vision, if you will, clearly calls for the defendants to  
17 identify as to each plaintiff what affirmative defenses they  
18 are asserting. That's part of the reason for that -- part  
19 of the reason, not the entire reason, but part of the reason  
20 for that plaintiff-specific short-form complaint or fact  
21 sheet.

22 MR. BLECHMAN: Thank you.

23 THE COURT: Mr. Eddy, I see your hand raised.

24 MR. EDDY: Yes, Your Honor. Two things. The  
25 defendants in the *Broilers* case were required to submit a

1 consolidated answer. That's just addressing a point between  
2 you and Mr. Blechman.

3 I'm coming at this a little differently with a  
4 proposal, that there are eight law firms on the DAPs side in  
5 the MDL that have filed complaints for 23 -- or filed 23  
6 complaints. And rather than having a massive artificial  
7 complaint and a massive artificial response, I would propose  
8 that we do it on a by-firm basis, which means the defendants  
9 could take each complaint filed by a firm, whether it's  
10 Boies Schiller or Kenny Nachwalter or Carlton Fields or my  
11 firm, Nexsen Pruet -- we filed three complaints -- they're  
12 all the same pattern, and I am sure that's the case for  
13 every other DAP that's filed, that the defendants simply  
14 answer the complaints by firm. That preserves the  
15 uniqueness of the claims. That preserves our ability on  
16 remand to take these complaints back to the courts where we  
17 filed. And it imposes no burden on them. Basically, they  
18 have to file eight answers. They're specific to the  
19 allegations raised by each firm and their clients. No one  
20 has to get involved with allegations of other firms or other  
21 plaintiffs.

22 And they've had these now for well beyond the  
23 federal rules. We could simply -- Your Honor could simply  
24 direct that they file their answers to those in 30 days. We  
25 don't have to have this massive delay. And as Mr. Gant

1 said, they've had the Sysco complaint for a year. And  
2 they've had the complaints of my clients for up to nine  
3 months.

4 So they're not -- there's no prejudice to them.  
5 It makes everything plaintiff-specific. It does require  
6 them to file eight answers, but they're going to be  
7 patterned to those complaints. And to the extent someone  
8 amends, then that can be dealt with. And if they have a  
9 motion to dismiss, they can, you know, file it with respect  
10 to that firm's complaints.

11 I know this is kind of taking a step from left  
12 field, and I apologize for throwing out a new concept, but I  
13 think it's something that will cut down the delay that we're  
14 all concerned with as discovery is ongoing. It doesn't  
15 require the plaintiffs to do anything further. They've  
16 already drafted and filed their complaints, and the  
17 defendants have had them for a long time. Maybe they need  
18 45 days. I don't know. But it seems to me that let's just  
19 get on with responding to what they have.

20 Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Eddy. And first, thank  
22 you for correcting my lack of information on the  
23 consolidated answer in *Broiler*. I thought I had stayed  
24 relatively up to date on what went on in *Broiler*, but I  
25 missed that detail.

1           Are you advocating for a consolidated answer if  
2           there is a required consolidated complaint or simply  
3           pointing out that yes, there is precedent for it and it was  
4           done?

5           MR. EDDY: Well, it is a massive document, as you  
6           might expect, and I think both the amended consolidated DAP  
7           complaint and the answers are massive. They're more than  
8           1,200 pages probably together.

9           If we are going -- the DAPs are going the route of  
10          a master consolidated complaint, then I think the defendants  
11          should respond in the same manner as they did, and without  
12          problem, in the *Broilers* case.

13          THE COURT: I guess I'm asking a slightly  
14          different question. I mean, there's -- and that is,  
15          understanding that you believe there shouldn't be a master  
16          complaint, does it advance the ball for the plaintiffs for  
17          there to be a master answer, or is it more about if we've  
18          got to go through this misery, they ought to have to go  
19          through this misery as well?

20          MR. EDDY: A fair question, Your Honor. I think  
21          at the end of the day what my clients are concerned about,  
22          and I think this is something that Mr. Blechman said, we  
23          want to know how they respond to the claims that we have  
24          asserted for our clients and what their defenses are on a  
25          client-by-client basis. So if that's in a massive answer,

1       that's fine. If that's done by separate filings, that's  
2       what we need and we need it now.

3               THE COURT: Thank you, Mr. Eddy.

4               I see Mr. Gant's hand up. I wasn't sure if it was  
5       up again or it just had never come down.

6               Mr. Gant, did you have something else?

7               MR. GANT: Yes, Your Honor. I had taken it down  
8       and then put it back up in response to the question you just  
9       posed to Mr. Eddy.

10              And I'll preface this by saying obviously I have  
11      not had a chance to confer with any other DAP about this, so  
12      we're speaking only for our clients in this regard.

13              To your specific question about whether the  
14      defendants should be required to file an amended answer --  
15      excuse me, a consolidated answer if the DAPs are, my view is  
16      no. To the contrary. First of all, I wouldn't compound  
17      what we view as a bad idea with a second bad idea.

18              But more importantly, more specificity is  
19      important. And one of the problems, in our view, with a  
20      consolidated pleading, as we've discussed, is it compels us  
21      to homogenize where we are putting all of our allegations  
22      together and trying to sort out how they compare, and as  
23      Mr. Randall pointed out, and then having to dissent from  
24      allegations that others have made, which is what has to  
25      happen in *Broilers*.

1           We just filed -- you may have seen our second  
2           amended consolidated complaint there, which was 450 pages  
3           and has sections where DAPs are disagreeing with one  
4           another. It is a painful process, and I do not wish that on  
5           the defendants as punishment. There's no reason for us to  
6           do it, and there's no reason for them to do it. They should  
7           each be required, in my view, again, speaking only for our  
8           clients, to provide answers which provide specific responses  
9           that reflect their views and their allegations and their  
10          positions about the allegations and asserting with  
11          specificity the defenses and affirmative defenses with  
12          respect to each and every DAP.

13           THE COURT: Thank you, Mr. Gant.

14           Mr. Randall, I see your hand up. Is it again or  
15          still?

16           MR. RANDALL: No, Your Honor. I should put it  
17          down. I apologize.

18           THE COURT: Very well. I've never figured out how  
19          to put it down. I just thought it went down on its own at  
20          some point.

21           Mr. Blechman, did you have something more?

22           MR. BLECHMAN: I did, Your Honor. I wanted to  
23          just say that in listening to Mr. Eddy's suggestion to you,  
24          I was struck by the fact at how it aligns each law firm's  
25          fiduciary duties to their clients with pleading. And I'm --

1 all of us are sensitive to the fact that the Court wants to  
2 find -- and as Your Honor noted, the Court wants to strike  
3 the right balance so that it can efficiently manage this  
4 case that centralizes cases that have been filed not only in  
5 the District of Minnesota, but in transferor courts as well  
6 under the MDL. And so we get it about the desire to do  
7 that, but lost in the shuffle should not be the fiduciary  
8 duties that unmistakably each of these firms owe to their  
9 respective clients that then translates into the pleadings  
10 that appear and the allegations that are made.

11 And Mr. Eddy's suggestion to you struck me as  
12 really finding the right balance in that because it reduces  
13 the number of complaints, it allows for plaintiff/defendant  
14 specific responses, and allows this process to go forward  
15 without the kind of burgeoning consolidated pleading that is  
16 going to -- I think is going to -- at the end of the day  
17 we're going to look back at it and say, no good deed goes  
18 unpunished, because this is going to be an exercise that is  
19 going to take so long and become so unwieldy in the result  
20 that you're getting that it becomes very difficult to  
21 translate in terms of its application through the case.

22 But I come back to first principles, that each of  
23 these firms owe fiduciary duties to our respective clients,  
24 and that, I would suggest, has to be incorporated into the  
25 way in which the pleadings are structured for purposes of

1 managing the case.

2 Thank you.

3 THE COURT: Thank you.

4 All right. Let me ask if any of the counsel for  
5 the class plaintiffs wanted to comment. And I see  
6 Ms. Van Engelen.

7 MS. VAN ENGELEN: Good morning, Your Honor. Thank  
8 you for your time today.

9 To the extent that the Court is considering a  
10 consolidated DAP complaint, the classes are not going to  
11 take a position.

12 You did mention possibly down the road a  
13 consolidated class complaint, and the classes would have  
14 concerns about that. As you know, in these actions,  
15 pass-through is not relevant for direct purchaser actions.  
16 It's not a relevant defense. But consumers, we have to  
17 prove pass-through as part of our case.

18 Similarly, the direct purchaser complaint alleges  
19 violations under the federal antitrust statute. We as the  
20 consumers, and the commercial indirect purchasers as well,  
21 are bringing causes of action under the laws of 25 different  
22 states. So there's a fundamental difference there.

23 Finally, the consumer indirect purchasers are the  
24 only class that has brought a rule of reason claim in  
25 addition to the standard Section 1 claims.

1 And for these reasons we think that it would be  
2 better to keep the class complaints separate. I don't  
3 believe we've seen any of the issues or have any issues  
4 arise that would require consolidating the class complaints.

5 Thank you.

6 THE COURT: Thank you, Ms. Van Engelen. And you  
7 correctly heard me, that at this point we're not looking at  
8 that but certainly would -- if it seems like a good idea at  
9 some point in the future, we would be gathering before we  
10 went there. So thank you.

11 Anything else from any of the class plaintiffs'  
12 counsel?

13 All right. Let me ask whether any of the defense  
14 counsel want to comment then.

15 MR. TAYLOR: Your Honor, this is Jarod Taylor.  
16 I'm trying to raise my hand, but if no one else has yet,  
17 maybe I can just lead off.

18 THE COURT: Yeah, I saw you first, so go ahead. I  
19 do see Mr. Robison's hand raised. I'll call on him  
20 afterward. But, Mr. Taylor, please go ahead.

21 MR. TAYLOR: Great. Thank you.

22 So I guess, just responding to a few points that  
23 DAPs raised, understanding that I'm sure we'll hear  
24 elaboration on the written papers and, you know, we would  
25 like the chance to respond to anything DAPs have to say,

1 obviously. I don't know if, you know, a mutual exchange  
2 before filing makes the most sense or if an  
3 objection/elaboration by DAPs followed by a reply by  
4 defendants makes sense, but we would appreciate just if we  
5 could be heard on the issues they raise after we see them so  
6 that we can consider them.

7 And then moving to the substance, I think the  
8 delay complained of is exaggerated. Perhaps it's no  
9 surprise that that would be our position since we've  
10 discussed and the courts have probably -- the Court has  
11 probably analyzed allegations among the complaints are  
12 similar.

13 The one concrete example of a different set has  
14 been raised today is that a couple of the DAPs have Packers  
15 and Stockyards Act claims. My understanding is that that  
16 doesn't really vary the factual or concrete factual  
17 allegations much, but it does require a different section  
18 where you have a certain claim that essentially repeats the  
19 legal elements. I don't think it will be a surprise to  
20 anyone that all defendants will deny all of those. And I  
21 don't think that will put much burden on DAPs to specify, we  
22 have this four extra paragraphs or whatever it is that  
23 essentially merit the legal elements of that claim.

24 You know, we've heard a few concepts thrown out,  
25 like fiduciary duty, which DAPs undoubtedly do owe to their

1 clients, but what we haven't heard is the tie between that  
2 concept and the delay and why it would cause delay. It's  
3 right that defendants have had the complaints for a long  
4 time, but similarly, DAPs have been conducting discovery  
5 together, taking depositions together. They know -- you  
6 know, the claims mirror each other, largely. And, you know,  
7 I think there is probably -- our position is it's an  
8 exaggeration that each slight difference in wording or  
9 allegation based on the public record, public statements and  
10 the like, whatever it might be, will require a painstaking  
11 Rule 11 investigation going back to the well.

12           You know, if some caveat is necessary to allay  
13 DAPs' concerns, if they would somehow be violating Rule 11  
14 by echoing a fellow DAPs' allegation, I think we could  
15 address that. I don't think we would be moving for  
16 sanctions and saying what is your specific basis for making  
17 that allegation when you didn't originally. So I think  
18 those concerns can be dealt with and are exaggerated.

19           The specific things, assuming the Court does end  
20 up going down this route, that I think we would benefit from  
21 having clarified are the extent to which it is an operative  
22 complaint so that we can rely on these allegations and don't  
23 have to go back to the original complaints and double-check  
24 that everything has been caught in the consolidated  
25 complaint and so that we can take comfort when we answer the

1 consolidated complaint that our responsibilities under the  
2 rules have been satisfied. And to the extent we need to  
3 move to dismiss, in part, the consolidated complaint, we can  
4 take comfort that we are dealing only with the consolidated  
5 complaint and that it's procedurally proper under the rules  
6 to make a motion against it, which segues into my final  
7 point, that how and when to handle a motion to dismiss this  
8 consolidated complaint and how we handle any future  
9 short-form complaints should be included as well.

10 I don't know that there's much to argue on that  
11 point or that it needs to be unnecessarily complicated, but  
12 it's just something that has to be addressed so we know when  
13 and how to do that.

14 THE COURT: And to the extent you've got some  
15 thoughts about how that might best work, that's absolutely a  
16 piece of what we would like to see addressed in your  
17 letters.

18 As far as your suggestion about having a chance  
19 for the parties to react to each other's letters, that's  
20 something I hadn't thought about, and I'm letting that  
21 percolate in the back of my head while I listen to other  
22 remarks, but I'll circle back at the end of this and we'll  
23 make sure we do what seems fair.

24 MR. TAYLOR: Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Taylor.

1 Mr. Robison.

2 MR. ROBISON: Your Honor, Mr. Taylor sort of  
3 addressed the only point I was going to raise, which is how  
4 the Court would like us to handle motions to dismiss. If we  
5 go down the route of having a master amended complaint  
6 joined by all of the existing DAPs, I just want to make sure  
7 we understand on the defense side when exactly we would file  
8 motions to dismiss as well as answers, because when the DAPs  
9 were speaking earlier -- and I think this happens at a lot  
10 of these status conferences with Your Honor and with Judge  
11 Tunheim -- when the DAPs are talking about how to go forward  
12 on complaints, their focus is on answers, defenses, and  
13 affirmative defenses, but I don't want motions to dismiss to  
14 get lost in the shuffle here. There's a fourth piece of the  
15 puzzle that's important to our side.

16 And so one of the main efficiencies we see with  
17 some sort of a master complaint or a consolidated complaint  
18 is that the Court and the parties will be dealing, we think,  
19 we hope, with one motion to dismiss that addresses what we  
20 see as pleading defects in the consolidated complaint rather  
21 than trying to move against 23 different complaints.

22 So Mr. Taylor sort of raised it, but that was the  
23 point I wanted to raise, which is how to handle motions to  
24 dismiss if we go down the route of having a master  
25 complaint.

1 THE COURT: And, again, as I indicated before, I'd  
2 be interested, and Judge Tunheim would be interested, in  
3 your thoughts about how you would propose to address that.  
4 And, obviously, among other things, your thoughts about how  
5 to -- you know, without going the route of a consolidated  
6 answer, it doesn't necessarily mean that we want to see, you  
7 know, half a dozen, you know, or eight separate motions to  
8 dismiss either. And so we would be interested in hearing  
9 your thoughts about how something like that might be  
10 organized in a way that minimizes the amount of redundant  
11 briefing for this, not only for the sake of the parties, but  
12 for the sake of the Court.

13 Thank you, Mr. Robison.

14 Anyone else on behalf of the defendants? I don't  
15 see any other hands.

16 All right. Then let's turn to the second piece,  
17 which had to do with establishing liaisons as well as a  
18 steering committee that would further the coordination of  
19 the cases across the bridge between the class plaintiffs and  
20 the direct action plaintiffs.

21 And I'll start with the class plaintiffs this time  
22 since I started with the direct action plaintiffs last time.  
23 And, Ms. Van Engelen, your hand shot up first.

24 MS. VAN ENGELLEN: Thank you, Your Honor.

25 We are interested in this idea, and we would like

1 to confer among the classes and among the DAPs to consider a  
2 structure.

3 It would be helpful if Your Honor would be  
4 interested in issuing a ruling on what kind of tasks or  
5 responsibilities you'd like the steering committee to have  
6 so that we can assess that when meeting and conferring among  
7 each other.

8 THE COURT: I think Judge Tunheim was, to some  
9 extent, interested in what tasks you would propose, but I  
10 know he also has some ideas in mind for what he would  
11 expect.

12 Let me talk with him about that. One possibility  
13 might be rather than a formal order, at least some kind of  
14 letter or something that says, here are the kinds of things  
15 the Court has in mind that would be on the plates of the  
16 liaisons and the steering committee so that you can take  
17 that into account in your conferring and also so if there  
18 are things you think don't belong there or ought to be added  
19 to it, then you've got something to react to.

20 Would that make sense?

21 MS. VAN ENGELLEN: That would make sense to us,  
22 Your Honor, and it would be very helpful. I believe that we  
23 would be able to corral the parties and get you a joint  
24 submission within a week of something like that.

25 THE COURT: Okay. Got it. Thank you. All right.

1 I will definitely talk with the Chief about that.

2 That suggests to me that I may be looking for two  
3 letters or two sets of letters rather than one letter  
4 addressing -- from each category of people addressing both  
5 things because there may be a little different process for  
6 reacting to the master complaint proposal and different  
7 timing for reacting to that than for reacting on the liaison  
8 and steering committee side of things.

9 Okay. Anybody else? Before I call on you,  
10 Mr. Bates, let me just check and see if there's anyone else  
11 among the class plaintiff counsel who wanted to react on the  
12 liaison and steering committee side of things. No.

13 All right. Mr. Bates.

14 MR. BATES: Thank you, Your Honor.

15 And before I speak to the liaison and steering  
16 counsel issue, I wanted to raise one thing that Mr. Robison  
17 just said about motions to dismiss, if I could.

18 THE COURT: Yes.

19 MR. BATES: And so Mr. Robison's discussion with  
20 Your Honor about motions to dismiss and how that plays into  
21 the master complaint underscores the concerns that Puerto  
22 Rico has about being included in the master complaint  
23 because as I mentioned to Your Honor, the defendants moved  
24 to dismiss Puerto Rico's complaint. That motion was denied  
25 in part, and the defendants have since answered Puerto

1 Rico's operative complaint. And so it gets confusing if  
2 Puerto Rico is required to be bound by a master complaint  
3 that defendants then intend to move to dismiss, even though  
4 defendants have already had that opportunity with respect to  
5 Puerto Rico.

6 And so I didn't understand Mr. Robison to be  
7 saying that defendants intended to move again as to Puerto  
8 Rico. It just underscores the confusion with including  
9 Puerto Rico in the master complaint. But to the extent that  
10 that is something that defendants are contemplating, Puerto  
11 Rico would obviously have a problem with that. So I just  
12 wanted to say that.

13 THE COURT: Understood. Thank you, Mr. Bates.

14 Mr. Robison, I saw you come up on screen. Did you  
15 want to tie that off at all?

16 MR. ROBISON: Sure, Your Honor. Mr. Bates is  
17 right. We would not, on the defense side, be trying to move  
18 again on something that we had already addressed and the  
19 Court had already addressed on a prior motion to dismiss as  
20 to Puerto Rico.

21 THE COURT: All right. Thank you, Mr. Robison.

22 MR. BATES: And, Your Honor, if I could just turn  
23 back to the liaison counsel and steering committee issue.  
24 As I previewed for Your Honor in my earlier remarks, there  
25 are substantive differences between the Commonwealth of

1 Puerto Rico and the other direct action plaintiffs. The  
2 Commonwealth of Puerto Rico is obviously not a commercial  
3 entity. They don't sell products. They have claims on  
4 behalf of their own citizens in a *parens patriae* capacity  
5 that are different than the commercial claims that are being  
6 brought by the direct action plaintiffs. And so their  
7 interests are different, their allegations are different.  
8 And the evidence that Puerto Rico is going to marshal to  
9 prove its case, although it may overlap with the direct  
10 action plaintiffs in some ways, is going to be different.

11 So Puerto Rico has serious concerns about a  
12 structure in which a liaison counsel who represents the  
13 other direct action plaintiffs -- and as Your Honor  
14 mentioned, it may be reasonable to group together because  
15 they share common characteristics -- Puerto Rico doesn't  
16 share those common characteristics, and so it would be  
17 inappropriate for Puerto Rico to be represented by a lawyer  
18 for the direct action plaintiffs that are commercial in  
19 nature in this kind of a liaison counsel/steering committee  
20 structure.

21 I'm happy to serve as liaison counsel for  
22 governmental entities in such a structure, which at this  
23 point includes Puerto Rico. It may include others in the  
24 future. I don't know. But if it would be helpful to the  
25 Court in terms of structuring this proposal, I'm happy to

1 fill that role. Puerto Rico's only point is that Puerto  
2 Rico shouldn't be lumped in with the rest of the direct  
3 action plaintiffs.

4 THE COURT: Thank you, Mr. Bates.

5 MR. BATES: Thank you, Your Honor.

6 THE COURT: Anyone else from the plaintiff side?  
7 Then I'll turn to other direct action plaintiffs.

8 Mr. McCahill, I see you.

9 MR. McCAHILL: Good morning, Your Honor. And I  
10 apologize if my background is a little dark. I think Mr.  
11 Robison and I share both a barber and the lighting crew for  
12 our Zoom. So apologies.

13 But I just wanted to put on the record -- I'm sure  
14 some of my co-DAP counsel will have more to say on this  
15 particular issue on the liaison counsel issue and the  
16 coordination, but I would just like to put on the record  
17 that over the past four or five months, myself and a whole  
18 host of DAP counsel who represent differing clients, people  
19 in different streams of the distribution chain, have been  
20 working collaboratively with the classes on scheduling  
21 depositions and following up with defendants on various  
22 things. So that process is already -- informally has proved  
23 to be pretty effective to date.

24 And I just wanted to let Your Honor know that that  
25 was something that was going on and to put on the record

1       that we've been collaborating with counsel for the classes,  
2       I think, personally, pretty effectively over the last few  
3       months as discovery has heated up.

4               THE COURT: Thank you.

5               Anyone else for the direct action plaintiffs?

6               All right. Let me get input from the defendants  
7       then on kind of the organizational side of the conversation  
8       today and liaison -- and obviously this has to do with the  
9       organization among the plaintiffs, but certainly there are  
10       implications for how the case goes from the defense  
11       perspective, so I want to give you a chance for your input  
12       as well.

13              Anybody want to comment? No, I don't see anybody  
14       jumping to raise their hands.

15              All right. Well, I see Mr. Gant. Did you have  
16       something else?

17              MR. GANT: Yes, but I wanted to give the  
18       defendants an opportunity first. But to repeat a point that  
19       I made in one of our previous conferences with the Court, we  
20       believe that the defendants should also be required to  
21       appoint a single liaison counsel if that is going to be a  
22       requirement of the plaintiffs. I can't conceive of any  
23       reason why that shouldn't happen. And the case, if it's  
24       going to be organized, it should be organized on both sides.

25              So if the defendants have one liaison counsel

1 among the DAPs and one among the classes to go to, we would  
2 like the same convenience, Your Honor. Thank you.

3 THE COURT: Makes sense.

4 Anybody from the defense side want to comment now  
5 that they've heard Mr. Gant's remarks?

6 MR. ROBISON: Your Honor, Brian Robison for  
7 Smithfield.

8 I don't think the defendants have talked much  
9 about the idea of liaison counsel. I think that defendants  
10 have been able to coordinate well with all of the various  
11 plaintiff groups, but we will certainly talk about it.  
12 We'll put something in a post-conference letter if we have  
13 any problems with it.

14 But it sounds like what the Court envisions is one  
15 single person as sort of a point of contact for scheduling  
16 conferences and meet-and-confers and that sort of thing and  
17 not something that would be a person who would be authorized  
18 to bind parties to positions and that sort of thing. So  
19 defendants' side I just don't think came to this conference  
20 with a definite position on that, but we will put something  
21 in writing.

22 THE COURT: All right. Thank you, Mr. Robison.

23 Anybody else? I see Mr. Gant's hand still up, but  
24 I think that's still up and not up anew.

25 All right. Well, thank you. Given that I just

1 kind of threw this at you, I really, really appreciate the  
2 thoughtful remarks that you offered today. I know Judge  
3 Tunheim will appreciate them as well. We've got a court  
4 reporter here for a reason. She's been taking it down, but  
5 I'll also be reporting back to Judge Tunheim kind of with my  
6 distillation of what I heard, and we will talk about it  
7 further.

8 Let's talk now about your opportunity to provide  
9 some written remarks. I think that the point that was made,  
10 and I don't remember who made it, about an opportunity to  
11 react to the other side's comments, I think that makes sense  
12 as long as we don't take it to an extreme. We'd like to  
13 move this along fairly promptly.

14 So let me ask, would you -- and what I want to do  
15 first is let's just talk about your written thoughts on the  
16 master complaint proposal. We'll set the liaison and  
17 steering committee piece aside for a moment. Let's just  
18 talk about the master complaint proposal.

19 Would you all be able to provide any supplemental  
20 written remarks by close of business Monday, for example?  
21 My idea being that I would then look for any brief responses  
22 to each other's remarks by close of business on Wednesday.

23 Let me just hear if anybody believes that doesn't  
24 give you adequate time to react.

25 Mr. Kaplan?

1 MR. KAPLAN: Your Honor, I would suggest a week,  
2 one week. We have a weekend coming up.

3 THE COURT: We do. You guys don't work weekends?

4 MR. KAPLAN: Yeah, we do, unfortunately, but . . .

5 THE COURT: Yes. So do we, unfortunately.

6 How about close of business Tuesday and get  
7 replies, if you will, by close of business Thursday? Can  
8 you make that work?

9 MR. ROBISON: That works for the defendants, Your  
10 Honor.

11 THE COURT: Mr. Gant, Mr. Kaplan, can you make  
12 that work?

13 MR. GANT: Your Honor, we'll do whatever you ask  
14 us to. I will just point out that as a dad with kids on  
15 spring break all of next week, it's going to be a particular  
16 challenge. I don't know if I'm the only one affected by  
17 that. And I know spring break varies by school and by  
18 jurisdiction, but at least for me, next week is spring  
19 break, and I'm going to be on full-time co-parenting duty.

20 But if I may, aside from that point of personal  
21 privilege, Your Honor -- and we'll do whatever you need us  
22 to do and you think is appropriate, But I did have a  
23 question about the submissions.

24 THE COURT: Okay. Go ahead, Mr. Gant.

25 MR. GANT: And I'm not trying to make this more

1 argument, but as I expressed, we have deep concerns and  
2 questions about the implications on the schedule for what  
3 the Court appears to be asking us to do. That's compounded  
4 by the defendants' unsurprising observation that they plan  
5 to move to dismiss the consolidated pleading that we're  
6 going to be compelled to file. And under the ordinary  
7 course of things, that would then obviate their obligation,  
8 which has already passed, to file a responsive pleading.

9 So we're looking at not having defenses and  
10 affirmative defenses and an answer for months, and perhaps  
11 until the end of fact discovery. And I am genuinely  
12 confused and concerned about how we're going to manage these  
13 two facts that you're asking us to undertake this process,  
14 which will be filed by motion to dismiss briefing on the one  
15 hand, and the other fact that we have a discovery schedule  
16 that is actively underway and has an impending deadline.  
17 And is that something that you want us to address in these  
18 filings? That's the specific administrative question, Your  
19 Honor.

20 THE COURT: The administrative question of how the  
21 discovery schedule is going to interact with motions to  
22 dismiss, you mean?

23 MR. GANT: Yes.

24 THE COURT: I think --

25 MR. GANT: Both the schedule for filing an amended

1 consolidated DAP pleading and the presumably inevitable  
2 motion to dismiss briefing which will follow that, how those  
3 two things are going to interact with the ongoing discovery  
4 and the discovery deadline that is currently in place.

5 THE COURT: I'm trying to think how to respond to  
6 that. I've certainly heard you loud and clear on your  
7 concerns along those lines. I will make sure that those are  
8 conveyed to Judge Tunheim, and you can also reiterate and  
9 underscore those in your letter as well.

10 At this point I don't -- I don't think we're --  
11 let me think about this.

12 Well, let me ask you a clarifying question. If I  
13 said yes, I'd like you to address that in your letter, what  
14 do you have in mind? I'm trying to get a sense of kind of  
15 what specifically you're asking.

16 MR. GANT: Well, in terms of what the substance of  
17 a response would be, it would be to caucus and then come up  
18 with our view.

19 All I can tell you, which I've already conveyed,  
20 is that it's extremely challenging and prejudicial, and we  
21 have depositions that we are taking and will take in the  
22 coming months and we'll do that without the benefit of  
23 having received a responsive pleading or defenses and  
24 affirmative defenses. And, you know, at a minimum, I would  
25 think that we can no longer meet the discovery deadline

1 that's in place and that we would need to have the right to  
2 reopen depositions, for example. But we would need to  
3 caucus as a group and hopefully come up with a unified  
4 position or express different positions of different DAPs on  
5 the question.

6 So the question I was posing is do you want us to  
7 address that in the letter or do you contemplate addressing  
8 that in some other way at some other time?

9 THE COURT: Well, I think the risk that that  
10 would -- the risk that that would become necessary I think  
11 is the same as the risk you identified in this conversation.  
12 I think you can reiterate that.

13 I don't think you need to get into the  
14 nitty-gritty about and here is precisely how much more time  
15 we would need and that kind of thing. If you've got  
16 thoughts about how long it would take to develop a master  
17 amended complaint, I think that's a point you've raised  
18 before, the plaintiffs generally have raised before. I  
19 think that if you've got some thoughts about if we go this  
20 route, this is how long we would need to do this and then  
21 pointing out that that has implications potentially for then  
22 when motions to dismiss are filed and then whether discovery  
23 can be completed on time, to that level of detail, yes. But  
24 I don't know that we're looking for you to propose an entire  
25 new scheduling order, if you will, based on the proposal of

1 a master amended complaint.

2 Does that answer your question?

3 MR. GANT: It does, Your Honor. That's helpful.

4 I think I understand what you have in mind. Thank you.

5 THE COURT: Anything else?

6 All right. So I'd like to get follow-up letters  
7 on the master amended complaint by close of business on the  
8 22nd. Any responsive letters by close of business on the  
9 24th -- actually, I won't even be -- yeah, never mind. I  
10 was about to reverse myself, but no. So close of business  
11 the 22nd; close of business the 24th.

12 With regard to the liaison and steering committee  
13 proposal, let me talk to Judge Tunheim hopefully today about  
14 the idea that it would be easier to provide specific  
15 comments on that with some more guidance about what tasks  
16 would be on the plates of those respective roles. And I  
17 will get back to you on that just as soon as I have a chance  
18 to talk with Judge Tunheim, and then we'll set a deadline  
19 for responding in light of that.

20 I know, Ms. Van Engelen, you suggested a week to  
21 respond so that the different groups of people could  
22 coordinate with each other on that. That will probably be  
23 fine, but I want to confirm that with Judge Tunheim as well.

24 MS. VAN ENGELEN: Thank you, Your Honor.

25 THE COURT: All right. I think that covers what

1 we came to cover today. Thank you very much for your  
2 listening and your reacting and your thoughtful and  
3 respectful comments. And I will look forward to your  
4 letters and I will, in the meantime, be chatting with Judge  
5 Tunheim about what I've learned today.

6 Take care, everybody.

7 (Court adjourned at 11:30 a.m.)

8  
9 \* \* \* \* \*

10 **REPORTER'S CERTIFICATE**

11 I, Paula K. Richter, certify that the foregoing is  
12 a correct transcript from the record of proceedings in the  
13 above-entitled matter.

14  
15 Certified by: s/ Paula K. Richter  
16 Paula K. Richter, RMR-CRR-CRC  
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